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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

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LEVIS LEON ALDRIDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether a defendant in a capital prosecution who has successfully shown that the assistance rendered by counsel was ineffective must also show, in order to gain a new trial, that the deficient conduct of counsel was so prejudicial that it probably affected the outcome of the proceeding?

2. Whether the Florida Supreme Court's application of the Elledge rule in petitioner's case -- under which the Court failed to review the only aggravating circumstance found by the trial court -- violated petitioner's Eighth Amendment rights?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed December 22, 1982, upon which rehearing was denied on February 22, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida which is the subject of this petition has not yet been reported, but will be reported as Aldridge v. State, ___ So.2d___(Fla. 1983). It is set out in slip opinion form at pages 1a-8a of the Appendix filed separately with this petition. Rehearing with respect to this opinion was denied, and the order denying rehearing is set out at page 9a of the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on December 22, 1982, and petitioner's timely motion for rehearing

was denied on February 22, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein the deprivation of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at pages 16a-17a the Appendix.

STATEMENT OF THE CASE

On October 17, 1974, petitioner was indicted for first degree murder with respect to the killing of a man named Robert Ward during the commission of an armed robbery on September 3, 1974. (R. 1-2)[1] Trial by jury was held January 6 through January 8, 1975, at the conclusion of which petitioner was convicted of

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[1]References to the various parts of the record herein will be designated as follows:

"R," for the record on appeal to the Florida Supreme Court from the judgment of conviction and sentence of death (Florida Supreme Court Case No. 46,958);

"T," for the transcript of pre-trial and trial proceedings in which petitioner was convicted and sentenced to death (Florida Supreme Court Case No. 46,958);

"RP," for the record on appeal to the Florida Supreme Court from the denial of post-conviction relief (Florida Supreme Court Case No. 61,673); and

"TP," for the transcript of proceedings pursuant to petitioner's motion for post-conviction relief (Florida Supreme Court Case No. 61,673).

first degree murder. (R. 81) The sentencing proceeding was conducted immediately thereafter, resulting in a jury recommendation of death. (R. 82) Petitioner was adjudicated guilty and sentenced to death on January 8, 1975. (R. 83-84)

Thereafter, petitioner appealed his conviction and sentence to the Supreme Court of Florida, and both were affirmed. Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978). On October 24, 1979, petitioner filed an Application for Relief Pursuant to Presnell v. Georgia[, 439 U.S. 14 (1978)] in the Supreme Court of Florida. The application was denied in an unreported order filed December 21, 1979 (Sundberg, J., dissenting), and this Court thereafter denied certiorari. Aldridge v. Florida, 449 U.S. 891 (1980).

During the pendency of his Presnell application, petitioner commenced the post-conviction proceedings which have led to the petition filed with the Court today. On November 2, 1979, petitioner filed a Motion to Vacate Judgment and Death Sentence pursuant to Fla.R.Crim.P. 3.850 in the trial court. (RP. 2-10) The motion to vacate was thereafter amended (RP. 37-45), and an evidentiary hearing was held December 8-9, 1981, with respect to petitioner's claim that his trial counsel had rendered ineffective assistance. It is this claim which is the subject of the first question presented to the Court in the instant petition.

Petitioner claimed that he was denied the effective assistance of counsel at trial because of counsel's substantial inability to and failure to prepare for trial. Because of counsel's (the public defender's) staggering caseload and the trial court's denial of a continuance, petitioner further claimed that counsel

failed to prepare for trial through no strategic choice but through the interference of the state. The evidence adduced in support of this claim overwhelmingly demonstrated that as a result of counsel's total lack of pre-trial preparation, petitioner, not unlike the petitioners in Powell v. Alabama, 287 U.S. 45 (1932), was deprived of "the guiding hand of counsel at every step in the proceedings against him." Id. at 69.

Shortly after his arrest on September 9, 1974, petitioner was found by the trial court to be indigent, and the Office of the Public Defender for the Nineteenth Judicial Circuit was appointed to represent him. (TP. 241) Thereafter, Assistant Public Defenders Wilkinson and Schopp were assigned to represent petitioner by the Public Defender, Elton Schwarz. Petitioner was indicted on October 17, 1974 (R. 1-2) and arraigned on October 21, 1974 (T. 2). By the date of his arraignment, petitioner had already recognized that his case was not being prepared adequately and so informed the court:

> "THE DEFENDANT: Your Honor, I can -- if I can get my witnesses and talk, and if the man would get the witnesses and talk to them, I am not guilty of this charge. I can't prove it myself. I am not guilty. I have got to have help. I realize the Public Defender's Office and everybody is busy, they have got a lot cases, and a lot of them to look after, but I am here on a serious charge. This is my life that is involved and I need every opportunity that is available to me to prove myself innocent."

(T.4)[2] Thereafter, on October 31, 1974, petitioner was again before

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[2]Petitioner's observations were well-founded, for in the five week period between the assignment of the public defender and petitioner's arraignment, virtually no investigation had been undertaken. The only actions take to prepare petitioner's case during this time were attempts to find various alibi witnesses describe by petitioner and to verify petitioner's finances at the time of the crime. (T.P. 243-244)

the court and he again asked that someone be appointed to defend him other than the Public Defender's Office. Petitioner explained that he believed that the Public Defender had too many cases and did not have sufficient time to devote to his case (T. 6). The trial court responded by saying that if petitioner were dissatisfied with the lawyers assigned to him he should talk to Mr. Schwarz, the Public Defender. The court also told petitioner that he could not appoint another lawyer to represent him (T. 7, 8).

Later that same day, petitioner was returned to the courtroom after he indicated he would not talk to Mr. Schopp or Mr. Wilkinson. Petitioner suggested he would be better off representing himself rather than accepting representation of lawyers who were not representing him properly (T. 10-12). On November 1, 1974, the trial court brought petitioner into chambers without counsel, and petitioner again informed the court that the lawyers appointed to represent him were not fully investigating the case or consulting with him. The trial court again informed petitioner he could not appoint another lawyer and told him that the Public Defender, Mr. Schwarz, would personally be present to represent him at trial. The court also told petitioner he could not go to trial without counsel and admonished him to work with his appointed lawyers and not create a disturbance at trial. (T. 17-19) The Public Defender's response to this situation was to reassign petitioner's case to himself even though his schedule was "such that I would not want to undertake the responsibility of assuring that he receives a fair trial on my own" (T. 10-11). (R. 40-41; TP. 164)

Because of his schedule at the time he took over the representation of petitioner, Mr. Schwarz informed the court that while he would personally be present at trial, he would be unable

to assume responsibility for the preparation of the case for trial. (R. 40-41; TP. 164)[3] Thus, as Mr. Schwarz further informed the court, he had no option but to assign the preparation of the case for trial to Willie Gary, a legal intern in his office, who was "the only other personnel available for preparation of this case for trial" (R. 40). Accordingly, Mr. Gary, who had just completed law school and was awaiting admission to the Florida bar (TP. 110-111), was put "in charge of the preparation of [petitioner's] case for trial" (R. 31). (TP. 166)[4] Despite this apparent delegation of responsibility to Mr. Gary, he testified that he did not perceive himself as in charge of anything since he was only an intern (TP. 113-114). He indicated that he did not really get involved in trying to prepare for trial until two or three weeks before it was scheduled (TP. 114-115). In addition, Mr. Gary had numerous other responsibilities during this period of time (TP. 155, 167). The only investigation Mr. Gary could recall was going to a bar with an investigator to look for witnesses (TP. 115-116).

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[3]During this critical period of time in petitioner's case, Mr. Schwarz's caseload was in the process of tripling. As he averred in his motion for a continuance,

> "On October 1, 1974 there were pending in the office of the undersigned Public Defender eight capital felony cases and one hundred and three non-capital felony cases. As of November 1, 1974, there were seven capital felony cases and one hundred fifty non-capital cases pending in said office; and on December 1, 1974 there were six capital felony cases pending and two hundred non-capital felony cases pending to be handled by the undersigned and six assistants along with an average of one hundred misdemeanor and juvenile cases per month. It is estimated that, at the present time, the case load has increased to almost three hundred capital and non-capital felony cases presently pending." (R. 40)

[4]Mr. Gary was admitted to the bar on December 20, 1974 (TP. 110), just seventeen days before trial began.

Because of these circumstances, Mr. Schwarz agreed in his testimony at the post-conviction hearing that little or no work was done in preparing the case for trial until the two or three week period before the trial began (TP. 114, 166).[5] No motions to suppress or in limine were filed, because counsel had not had sufficient time to assess whether such motions would be proper (TP. 185). No depositions were taken even though counsel believed depositions were essential in this case, and none of the State's evidence was examined prior to trial (TP. 116, 172-173, 237).[6] Further, there were at least thirty witnesses provided by the state to whom counsel had not talked and from whom statements had not been provided (TP. 175).

Mr. Schwarz testified unequivocally that as a result of their lack of pre-trial preparation, he and Mr. Gary were totally unprepared for the trial of petitioner's case (TP. 175). Mr. Schwarz further underscored this fact by testifying that he could not "ever recall going to trial even on a misdemeanor case in the state of readiness that we were at that time." (TP. 179) Because of these circumstances, Mr. Schwarz moved for a continuance of the trial four days before it was scheduled to begin (RP. 32-33, 39-41). On the day the trial was scheduled to begin, the motion was argued before the trial court, and Mr. Schwarz flatly asserted,

> "This case is not prepared. We are not in position to provide competent legal representation."

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[5]Mr. Schwarz did not personally become involved in trial preparation until at most two weeks before trial (TP. 166).

[6]While the state provided sworn statements from eight of the forty-five witnesses on their witness lists, neither counsel felt that these statements were a sufficient substitute for defense discovery depositions (TP. 118-119; 172-173). Further, Mr. Schwarz indicated that he had never gone to trial in a major case since his admission to the bar in 1954 without taking depositions (TP. 173).

(T. 26) Finding, nonetheless, that "[t]here has been ample time for everybody to be fully prepared," the trial court denied the motion for a continuance. (T. 26)

In sum, therefore, petitioner's evidence in support of his motion for post-conviction relief demonstrated that of the forty-five names of witnesses supplied by the state in its seven witness lists, only one had been investigated by the defense whatsoever and none were deposed; of the seven witnesses listed by the defense, only two had been spoken to by the defense; of the eighteen witnesses presented at trial, the defense had prior knowledge of only seven and then only from nonadversarial statements taken by the state; of the forty-one items of physical evidence introduced at trial, the defense had examined none and in fact had not been able to examine any of the physical evidence; that no motions, except form motions, were filed; that no real work was done on the case until a week or two before trial and that even this was superficial. Not surprisingly therefore, petitioner's evidence also demonstrated that his counsel was unable to provide effective representation at his trial. Counsel conducted admittedly seat-of-the-pants cross-examination, because he did not know the answers to questions he wanted to ask (TP. 198-199), frequently resulting in the admission of inadmissible evidence [e.g., threats to a witness (T. 337); collateral offenses (T. 578); petitioner's entire criminal record in specific detail (T. 436); petitioner's entire prison disciplinary record (T. 440); and petitioner's military AWOL's]. Counsel was unable to challenge any of the physical evidence (see T. 222, 237, 277); was unable to pinpoint descriptions, or what was said precisely by various witness, or relevant times, or alibi

(TP. 287-300). Counsel was unable to make any rational decisions regarding whether to put on witnesses regarding alibi or to investigate expert testimony (TP. 287-288). In short there were no defense tactics utilized at trial, because counsel had developed no information from which to make rational strategy decisions.

In the face of this uncontradicted record, the post-conviction trial court entered the following pertinent findings of facts and conclusions of law with respect to petitioner's claim that he had been denied effective assistance of counsel:

> "2. That defendant has detailed in his motion under Fla. R. Crim. P. 3.850 the specific omissions and overt acts upon which the claims of ineffective assistance of counsel are based.
>
> 3. That defendant has shown that the specific omission of trial counsels' failing to take pre-trial depositions upon oral examination of the State's main witnesses was a substantial and serious deficiency measurably below that of competent counsel.
>
> 4. That defendant has not shown that this specific deficiency of trial counsel's failing to take pre-trial depositions upon oral examination of the State's main witnesses, when considered under the circumstances of this individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that this deficient conduct effected [sic] the outcome of the trial.
>
> 5. That based upon the totality of the circumstances, defendant was not denied effective assistance of counsel at his trial for the crime of murder in the first degree."

(R.P. 76-77)

On appeal, the Supreme Court of Florida affirmed the trial court's denial of relief on the ineffective assistance claim, agreeing with the trial court that petitioner had failed to demonstrate sufficient prejudice as a consequence of counsel's concededly deficient representation. (Appendix 6a) With respect to the insufficiency of petitioner's demonstration of prejudice, the court

emphasized that

> "[a]ppellant has made no attempt whatever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of his trial."

(Appendix 6a)

In his post-conviction proceeding, petitioner also claimed that the Florida Supreme Court's failure to review on direct appeal the only aggravating circumstance found by the trial judge -- that the homicide was especially heinous, atrocious, or cruel (R. 85-86) -- deprived him of critical Eighth Amendment safeguards against the arbitrary imposition of the death sentence. (RP. 6, 39)[7] The post-conviction trial court summarily rejected this ground in an order denying the Motion to Vacate Judgment and Sentence on June 18, 1981 (RP. 11). In an expedited appeal from this order, the Florida Supreme Court summarily reversed the trial court with the following order (set out in its entirety):

> "Upon review of the Record, the Application for Stay of Execution and the Response of the State, the order of the trial court is reversed and this cause is remanded for an evidentiary hearing with respect to the issue of effectiveness of trial counsel. Fla. R. App. P. 9.140(g)."

(Appendix 10a) On remand, the trial court held the evidentiary hearing and entered the order discussed supra (concerning ineffective assistance of counsel). On the appeal thereafter, petitioner briefed all the issues he had raised in his post-conviction motion -- not just the issue of ineffective assistance -- on the basis

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[7] In its review of petitioner's sentencing proceeding on direct appeal, the Florida Supreme Court expressly refused to review the aggravating circumstance found by the trial judge, holding that such review was "unnecessary... inasmuch as there were no mitigating circumstances [footnote omitted] and adequate aggravating circumstances to sustain the penalty." Aldridge v. State, supra, 351 So.2d at 944.

that the Florida Supreme Court's summary reversal of the trial court's first order denying post-conviction relief plainly meant that the issues unrelated to the issue of ineffective assistance were still pending in the Florida Supreme Court. In the opinion of the Florida Supreme Court, however, it had disposed of these issues with the order quoted supra:

> "We previously rejected all the other alleged defects in the instant case when we remanded appellant's initial Rule 3.850 motion for an evidentiary hearing on the issue of the effectiveness of trial counsel."

(Appendix 6a) Thus, the Florida Supreme Court decided the second question presented herein without saying anything explicitly about it.

REASONS FOR GRANTING THE WRIT

I.

A DEFENDANT IN A CAPITAL PROSECUTION WHO HAS SUCCESSFULLY SHOWN THAT THE ASSISTANCE RENDERED BY COUNSEL WAS INEFFECTIVE SHOULD NOT BE REQUIRED TO SHOW, IN ADDITION, IN ORDER TO GAIN A NEW TRIAL, THAT THE DEFICIENT CONDUCT OF COUNSEL WAS SO PREJUDICIAL THAT IT PROBABLY AFFECTED THE OUTCOME OF THE PROCEEDINGS.

As described in greater detail in the Statement of the Case, supra, in state post-conviction proceedings, petitioner claimed that he had been denied effective assistance of counsel at trial due to his trial counsel's total inability to and failure to prepare his case for trial. The state trial court and the Florida Supreme Court agreed that counsel's failure to prepare for trial did in one respect -- the failure to take pretrial depositions -- deprive petitioner of effective assistance of counsel. Even though this finding inaccurately and unfairly represented the scope of

the ineffectiveness of the assistance provided,[8] the finding would have been a sufficient basis upon which relief could have been granted had the Florida courts determined that the deficient conduct were sufficiently prejudicial to petitioner. Accordingly, petitioner's case strikingly presents the question of the degree of prejudice which must be shown to require reversal of a capital conviction for ineffective assistance of counsel.

In assessing the degree of prejudice which must be shown to require reversal of any conviction for ineffective assistance of counsel, the Florida Supreme Court requires a showing that the

> "specific, serious deficiency [of counsel], when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings."

Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). In petitioner's case, petitioner failed to make this showing of prejudice, for he

> "made no attempt whatever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of the trial."

(Appendix 6a) Petitioner submits that the Knight test of prejudice and its particular application in this case present two critical questions concerning the proper analysis of claims of ineffective assistance of counsel which must be resolved by this Court.

First, petitioner's case clearly asks whether the "outcome

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[8] And thus, is not entitled to the presumption of correctness afforded in the federal courts by 28 U.S.C. §2254 (d). See 28 U.S.C. §2254(d)(8). Cf. Marshall v. Lonberger, No. 81-420, ___U.S.___, 51 U.S.L.W. 4113, 4116-4117 (February 22, 1983)

determinative" test of prejudice articulated in Knight is the proper test of prejudice in the constitutional analysis of any claim of ineffective assistance. This Court has already indicated the necessity of addressing the question of prejudice in the analysis of ineffective assistance claims by its recent grant of certiorari in United States v. Cronic, No. 82-660, ___U.S.___, 51 U.S.L.W. 3598 (February 22, 1983).[9] This case would be a helpful companion case to Cronic, since it presents one way of resolving the degree of prejudice issue -- through the utilization of an outcome determinative test. Although this Court has never squarely addressed the issue of the degree of prejudice which must be shown for a defendant to prevail upon a claim of ineffective assistance, it has in the past clearly indicated that some prejudice must be shown. See United States v. Morrison, 449 U.S. 361, 364-365 (1981). To the extent that the Court has addressed the degree of prejudice issue, all indications from the Court have been that the degree of prejudice shown -- at least in cases such as petitioner's which involve government/judicial interference with the ability of counsel to provide effective assistance -- need be no more than the demonstration of some "adverse effect" or of the threat of some adverse effect upon the effectiveness of counsel's representation.

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[9]The question presented in Cronic is whether the

> "... court of appeals correctly reverse[d] defendant's convictions on ground of ineffective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what reasonably competent criminal defense attorney would have done under the circumstances and without finding any prejudice to defendant?"

Ibid.

United States v. Morrison, supra, 449 U.S. at 365. See also, Geders v. United States, 425 U.S. 80, 88-89 (1976) (order preventing petitioner from consulting his counsel "'about anything'" during a 17-hour overnight recess between his direct - and cross-examination posed such a threat); Herring v. New York, 422 U.S. 853 (1975) (statute permitting the trial judge in a bench trial to deny right to make closing argument posed such a threat); Powell v. Alabama, 287 U.S. 45, 58-59 (1932) (compelling defendants to proceed to trial "within a few moments after counsel for the first time charged with any degree of responsibility began to represent them" posed such a threat).[10] Petitioner's proof, even as attenuated by the fact findings of the state courts, arguably met such a test of prejudice. However, the failure of his proof to meet the outcome determinative test applied by the Florida courts squarely presents the appropriateness of such a test to this Court.[11]

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[10] It should be noted as well that at least in Herring and Powell, the Court impliedly rejected the use of an outcome determinative test. Herring v. New York, supra, 422 U.S. at 864; Powell v. Alabama, supra, 287 U.S. at 58.

[11] It should also be noted that there is a conflict among the federal circuits and the state courts concerning the degree of prejudice issue. The United States Court of Appeals for the District of Columbia Circuit is the only court of appeals which has adopted the outcome determinative test, but even in that circuit, the continued adherence to that test is questionable. Compare United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (enbanc) (plurality opinion of Levanthal, J.) [adopting the outcome determinative test] with United States v. Wood, 628 F.2d 554, 559, 574 n. 82 (D.C. Cir. 1980) (en banc) (per curiam opinion joined by McGowan, Tamm, Leventhal, MacKinnon, Robb, and Wilkey, JJ.) (dissenting opinion of Baxelon, J., joined by Wright, C.J.) [turning away from the outcome determinative test] and United States v. Green, 680 F.2d 183, 188-189 (D.C. Cir. 1982) [explicity utilizing the outcome determinative test]. On the other hand, the United States Court of Appeals for the Eleventh Circuit -- which eventually reviews Florida convictions through habeas corpus proceedings -- has recently rejected the use of the outcome determinative test. See Washington v. Strickland 693 F.2d 1243, 1261-1262 (5th Cir. 1982) (Unit B). While the D.C. Circuit and, apparently, the Florida Supreme Court recognize that the outcome determinative test is too stringent a test of prejudice for

The second critical question presented by petitioner's case with respect to the proper analysis of claims of ineffective assistance of counsel involves the degree of prejudice which must be shown in a capital case. This Court's oft-and deeply-expressed concern that the processes by which guilt and sentencing determinations are made in capital cases be qualitatively more reliable than the same processes in non-capital cases, see, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625, 637-638 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118-119 (1982) (O'Connor, J. concurring), strongly suggests that the analysis of ineffective assistance claims in capital cases must reflect a proportionately greater degree of concern for the potential prejudice done to a defendant by the ineffective assistance of counsel in capital cases. Petitioner's case, again, strikingly presents this issue, for the state courts agreed that he did not receive the assistance of counsel which he was constitutionally entitled to receive. Whether the application of an outcome determinative test in capital cases is consistent with the Eighth Amendment is, therefore, also critically presented by this case.

Accordingly, the question presented by petitioner's case as to the degree of prejudice which must be shown in order for a capital defendant to prevail upon a claim of ineffective assistance of counsel is precisely the kind of question which this Court has described as warranting review, and certiorari should, therefore, be granted.

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footnote 11 continued:

ineffectiveness caused by government interference, see United States v. DeCoster, supra, 624 F.2d at 201; Valle v. State, 394 So.2d 1004, 1007-1008 (Fla. 1981), the Florida Supreme Court nonetheless applied the outcome determinative test in petitioner's case. Thus, the constitutional propriety of the Florida Supreme Court's resolve to adhere to the outcome determinative test -- even in a sea of conflict surrounding the appropriateness of that test -- can be no better presented than in this case.

II.

THE FLORIDA SUPREME COURT'S APPLICATION OF THE ELLEDGE RULE IN PETITIONER'S CASE -- UNDER WHICH THE COURT FAILED TO REVIEW THE ONLY AGGRAVATING CIRCUMSTANCE FOUND BY THE TRIAL COURT -- VIOLATED PETITIONER'S EIGHTH AMENDMENT RIGHTS.

In support of his decision to sentence petitioner to death, the trial judge found only one aggravating circumstance. Petitioner challenged this finding on his direct appeal. However, the Florida Supreme Court sidestepped petitioner's challenge (1) by itself finding two additional aggravating circumstances, and (2) with these findings -- coupled with the additional finding that there were no mitigating circumstances -- by holding that any error in the trial judge's assessment of aggravating circumstances was harmless. Petitioner submits that this process of "appellate review" in his case amounted to the appellate court's redetermination of his sentence. The process, therefore, presents a critical, unresolved question of Eighth Amendment law.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that the construction of an aggravating circumstance, as evinced by its application in a particular case, cannot be so vague or broad as to violate the requirements of Furman v. Georgia, 408 U.S. 238 (1972), that sentencing decisions be guided by clear, objective, rationally reviewable standards. Here, the only aggravating circumstance found by the trial judge -- that the homicide was especially heinous, atrocious, or cruel -- unquestionably did not pass the Godrey standards for specific guidance of sentencing discretion. According to the trial judge, the facts supporting

the finding of this single circumstance were the following: appellant carefully planned and prepared for the armed robbery in the course of which the victim was killed; the victim was a person who had been kind to appellant; the victim was killed by a single shotgun blast to the head; and appellant was a convicted felon on parole at the time of the homicide. (R. 85-86) Unquestionably, the construction of "especially heinous, atrocious or cruel" provided by its application to these facts is vague and overbroad when compared to the more limited construction utilized in other cases. See, e.g., State v. Dixon, 283 So.2d 1, 9(Fla. 1973) (holding that the circumstance must be based upon "additional acts" directed against the victim during the "actual commission of the capital felony," thus precluding consideration of the pre-crime acts of preparation, of the relationship between the defendant and the victim, and of the defendant's status as a previously convicted felon, all considered by the trial court here); Cooper v. State, 336 So.2d 1133 (Fla.1976), cert.denied, 431 U.S. 925 (1977) (re-affirming the Dixon construction of this circumstance); Williams v. State, 386 So.2d 538 (Fla. 1980)(finding of circumstance reversed where victim died almost instantaneously from gunshot wounds); Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 610 (1981) (finding of circumstance reversed where victim died quickly from single gunshot blast).

Because this was the only aggravating circumstance found by the trial judge, the court's improper consideration of it should have resulted in the vacation of petitioner's death sentence.

Godfrey v. Georgia, supra. However, the Florida Supreme Court avoided the required result by "finding" two additional aggravating circumstances which the trial court could have considered (but, according to his findings, chose not to) and by asserting that since the trial judge had found no mitigating circumstances, any error in finding the "heinous, atrocious or cruel" circumstance was harmless. (Appendix 14a)[12] The constitutionally required reversal of petitioner's death sentence cannot, consistent with the federal constitution, have been avoided by such judicial repair of the trial court's findings.

The trial judge based the death sentence solely upon the heinous, atrocious or cruel aggravating circumstance. Thus, if it had been stricken by the Florida Supreme Court as required, the sole basis for the trial court's imposition of the death sentence would also have been stricken, and the death sentence would necessarily have been reversed. See Godfrey v. Georgia, supra, 446 U.S. at 433. The reason for such a result is straightforward. Godfrey required that the sentencer's discretion be suitably guided, and if the only factor guiding the sentencer's discretion was too vague or broad to provide guidance, sentencing discretion was not suitably guided. Accordingly, under a Godfrey set of circumstances, even if an appellate court could find in the record

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[12] By this process, the Florida Supreme Court recast the case into the posture necessary for the application of the rule first expressly articulated in Elledge v. State, 346 So.2d 998 (Fla. 1977), which treats error in the assessment of aggravating circumstances as harmless if there are no mitigating circumstances.

additional factors which could have suitably guided the sentencer's discretion, this search would be to no avail, for the sentencer's discretion, as explicitly stated by the sentencer, would not have been guided by these additional factors.

Moreover, the Florida Supreme Court's attempt to avoid the requirements of Godfrey conflicted with the principles underlying Zant v. Stephens, ___ U.S. ___, 102 S. Ct. 1856 (1982). In Zant, the Supreme Court had been asked to decide "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." ___ U.S. at ___, 102 S.Ct. at 1857. While the state law rule under review in Zant had been consistently stated and followed by the Georgia Supreme Court, that court had never explained the rationale for its rule. Id. at 1858. Because the state court's rationale for such a rule could

> "undermine the confidence [the Court] expressed in Gregg v. Georgia ... that the Georgia capital sentencing system, as [the Court] understood it then, would avoid the arbitrary and capricious imposition of the death penalty ..."

id. at 1859, the Court certified a question to the Georgia Supreme Court relative to the state law premises underlying its rule. Ibid. While there has been no final resolution of the merits in Zant, the decision certifying a question to the Georgia Supreme Court with respect to a rule quite similar to the Elledge rule suggests the constitutional infirmity of such a rule. Zant makes clear that the facial validity of the Georgia death penalty statute

could well be undermined by the appellate court's assumption of the role of sentencer. Id. at 1858-1859.

By its affirmance of petitioner's death sentence, however, the Florida Supreme Court strikingly assumed precisely such a role. The Court found two aggravating circumstances which the sentencer chose not to find. Further, the court held that in the absence of any mitigating circumstances, any erroneous assessment of the "heinous, atrocious or cruel" aggravating circumstance would not have led the sentencer to impose a death sentence improperly.[13] With the sweep of its "appellate" hand, the Florida Supreme Court thus performed a sentencing function. It decided that if the trial judge had considered aggravating circumstances which he did not choose to consider, and if he had not considered the aggravating circumstance which he did choose to consider, and if he had found none instead of some mitigating circumstances, a death sentence would still have been imposed. Such speculation about the sentencer's exercise of

---

[13] In finding that there were no mitigating circumstances, the Florida Supreme Court also contravened the sentencing judge's findings, for the sentencing judge had found that the aggravating circumstance "far outweigh[ed] any mitigating circumstances shown by the evidence and which must be considered by the Court." While the judge had not detailed any of the mitigating circumstances which were thus outweighed, the very same allusion to the existence of such circumstances was sufficient in Elledge for the Florida Supreme Court to hold that the trial judge must have considered mitigating circumstances, thereby making the erroneous assessment of aggravating circumstances in Elledge harmful. 346 So.2d at 1003.

discretion under entirely different circumstances is not "review" of sentencing discretion, but is instead, the exercise of such discretion. Because such a result would clearly undermine the confidence expressed in Proffitt v. Florida, 428 U.S. 242 (1976), that the Florida capital sentencing system, as it was then understood, would avoid the arbitrary and capricious imposition of the death penalty, certiorari as requested herein, must be granted.[14]

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[14]While the Florida Supreme Court's assumption of the role of sentencer was not nearly as clear in Barclay v. State, 343 So.2d 1266 (Fla. 1977), sent. vacated and remanded, 362 So.2d 657 (Fla. 1978), app. after resentencing, 411 So.2d 1020 (Fla. 1982), this Court's recent grant of certiorari in Barclay [___ U.S. ___, 103 S. Ct. 340 (1982)] may well bring before the Court this very issue. Because of such a possibility, at the very least the certiorari decision in the petitioner's case should be held pending Barclay. See, e.g., Davis v. Georgia, Spraggins v. Georgia, Collins v. Georgia, Baker v. Georgia, Hamilton v. Georgia, Brooks v. Georgia, 446 U.S. 961 (1980) [cases held pending the decision in Godfrey v. Georgia, supra].

CONCLUSION

For the reasons expressed herein, the petitioner, LEVIS LEON ALDRIDGE, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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BY Richard H. Burr, III
RICHARD H. BURR, III
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Counsel for Petitioner

82-6438

Office-Supreme Court, U.S.
FILED
MAR 22 1983
ALEXANDER L. STEVAS,
CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

==========

LEVIS LEON ALDRIDGE,

Petitioner,

vs

STATE OF FLORIDA,

Respondent.

==========

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Supreme Court of Florida

No. 61,673

LEVIS LEON ALDRIDGE, Appellant,

vs.

STATE OF Florida, Appellee.

[December 22, 1982]

PER CURIAM.

This is an appeal from a denial of appellant's Rule 3.850 post-conviction relief motion to vacate judgment and sentence of death on the ground that he was not afforded reasonably effective assistance of counsel at trial. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm.

Appellant was convicted and sentenced to death by the trial court on January 8, 1976. This Court affirmed the conviction and sentence in Aldridge v. State, 351 So. 2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978)(Aldridge I). For the purpose of this opinion, the facts leading to appellant's conviction and sentence are briefly restated. Appellant, while on parole after serving approximately ten years in prison, was employed and befriended by Robert Ward, who worked in a restaurant. Having borrowed a shotgun and shells, appellant robbed the restaurant, and during the commission of the robbery, Ward was struck in the head and killed by at least one of three shots fired by appellant. Appellant was convicted of first-degree murder, and the jury recommended imposition of the

death penalty. The trial judge, finding no mitigating circumstances, and concluding that the murder was heinous, atrocious, and cruel, followed the jury's recommendation and sentenced appellant to death. In the appeal before this Court, appellant sought reversal of his conviction, raising three points: the admission of prejudicial photographs; the trial court's direction requiring a unanimous verdict; and the trial court's instruction on second-degree felony murder. We affirmed, holding that (1) the photographs were admissible as relevant and were not so objectionable and inflammatory as to require reversal; (2) the requirement of a unanimous verdict did not prejudice the defendant; and, (3) the reading of the second-degree felony murder instructions was not error. Appellant also claimed error in the sentencing phase, asserting that the trial court improperly found that the crime was heinous, atrocious, and cruel. This Court found no error in the sentencing phase and noted that appellant was under a sentence of imprisonment at the time of the murder, and that the murder was committed during the commission of a robbery.

Subsequent to this Court's opinion on the merits, the appellant, on October 29, 1979, filed an application for relief under this Court's all writs jurisdiction, claiming that this Court, in considering the appeal of his conviction and sentence, improperly found two aggravating circumstances which had not been found by the trial judge. We denied relief in an unreported order (Aldridge II) on December 21, 1979, and appellant's petition for certiorari to the United States Supreme Court on this issue was also denied. Aldridge v. Florida, 449 U.S. 891 (1980).

While appellant's application for relief filed under this Court's all writs jurisdiction was pending, the appellant, on November 2, 1979, filed a Rule 3.850 motion in the trial court, seeking to have his judgment and sentence vacated. In this motion, appellant contended that the death sentence was imposed on him in violation of the United States and Florida

constitutions and that he was denied effective assistance of counsel at trial. While this 3.850 motion was pending in the trial court, the governor, on June 16, 1981, signed a death warrant authorizing appellant's execution on July 15, 1981. The trial court, on June 18, 1981, denied appellant's motion without conducting an evidentiary hearing. In an expedited appeal, this Court reversed the trial court's order and granted a stay of execution on the grounds that an evidentiary hearing was required on the issue of effectiveness of trial counsel. The case was remanded for that purpose and relief on all other grounds was denied. Aldridge v. State, 402 So. 2d 507 (Fla. 1981)(Aldridge III).

The subject of this appeal is the trial court's finding after an evidentiary hearing in this Aldridge IV proceeding, that appellant had reasonably effective assistance of counsel at trial. At the evidentiary hearing, the trial court followed the standard established in Knight v. State, 394 So. 2d 997 (Fla. 1981), and found "[t]hat [appellant] has shown that the specific omission of trial counsels' failing to take pre-trial depositions upon oral examination of the State's main witnesses was a substantial and serious deficiency measurably below that of competent counsel." The trial judge concluded, however, "[t]hat [appellant] has not shown that this specific deficiency . . . when considered under the circumstances of this individual case, was substantial enough to demonstrate a prejudice to the [appellant] to the extent that there is a likelihood that this deficient conduct effected [sic] the outcome of the trial." Consequently, the trial judge denied appellant's post-conviction relief motion.

Appellant contends that he was denied effective assistance of counsel in four respects. First, appellant asserts that he was denied the right to counsel during pre-trial preparations by the assignment of a non-lawyer to represent him. Second, appellant contends that the trial court denied him effective assistance of counsel by refusing to appoint an attorney from

outside the public defender's office to represent appellant. Third, appellant contends that the denial of the public defender's motion for a continuance, which was filed immediately before trial, was prejudicial error which counsel should have raised on appeal. Fourth, appellant cites several specific acts and omissions on the part of appointed counsel, particularly the failure to depose witnesses, which he contends show that, under the totality of the circumstances, he was not provided effective assistance of counsel.

On the first point, appellant alleges that a part-time legal intern, not licensed to practice law, was assigned to his case and not properly supervised by a member of the bar. As a result, appellant contends, valuable preparatory work, such as the filing of motions and the taking of depositions, was not done. At the evidentiary hearing, the public defender testified that he was in charge of appellant's case and that the intern was merely assisting him in his preparation for trial. We agree with appellant that an accused in a criminal case has a right to counsel at every important stage of the proceedings, but find that appellant was not denied the assistance of counsel at the preparation stage or at any other stage of his trial.

In his second point, appellant asserts that conflict developed between himself and his appointed counsel, and that the trial court, after being informed of this conflict, erred in not appointing counsel from outside the public defender's office. Because the public defender's office is considered a "firm," appellant argues, whenever conflict arises, counsel not affiliated with the particular public defender's office must be appointed. We reject this contention. We find that appellant has misconstrued the meaning of conflict in this situation. In Babb v. Edwards, 412 So. 2d 859 (Fla. 1982), and Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976), conflict in a public defender's office arose out of multiple representation, and in Roberts v. State, 345 So. 2d 837 (Fla. 3d DCA 1977), conflict was created when an assistant public defender was called to testify

against a defendant represented by another assistant public defender working in the same office. The asserted conflict in this case arose out of appellant's fear that appointed counsel would make a "deal" for him, and his belief that appointed counsel had failed to properly investigate a state witness appellant contended was lying. This type of asserted individual conflict or personal disagreement does not mandate that new counsel be appointed by the court. It is clearly distinguishable from either Turner or Roberts, and there was no error in the trial court's refusal to appoint new counsel from outside the public defender's office. Furthermore, in this case the record reflects that once the public defender explained to appellant that the state witness was being investigated and that no "deal" could be made without appellant's consent, appellant acquiesced in the continued representation by the public defender's office.

Appellant's third contention is that the trial court erred in denying the motion for continuance. Although trial and appellate counsel now claim that the denial of the continuance was error, neither thought enough of this issue to raise it in post-trial motions or designate it as an issue on appeal. Nothing has been shown to this Court concerning what evidence could have been discovered had the continuance been granted or what would have been done differently if counsel had been afforded a continuance. No prejudice has been shown to have resulted from the denial of the motion for continuance, which is an issue that could have been raised in the original appeal. See Valle v. State, 394 So. 2d 1004 (Fla. 1981). To allow this issue to now be considered on the facts of this case affords counsel an opportunity to keep an issue in reserve for post-conviction relief proceedings. Since this was an issue which could have been raised on appeal, it is not a proper subject for post-conviction relief. See Zeigler v. State, 402 So. 2d 365 (Fla. 1981) cert. denied, 102 S. Ct. 1739 (1982); Spenkelink v. State, 350 So. 2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.

denied, 440 U.S. 976 (1979). Further, there being no specific prejudice shown, the failure to raise the issue on appeal cannot be a basis for a finding of ineffective assistance of counsel under the test adopted by this Court in Knight v. State, 394 So. 2d 997 (Fla. 1981).

Appellant's fourth point concerns appointed counsel's failure to take the formal depositions of state witnesses under Florida's criminal discovery rules. The test for determining whether effective assistance of counsel has been provided, as expressed in Knight, requires a defendant to show that a "specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel." 394 So. 2d at 1001. The trial judge found that appointed counsel's failure to take formal depositions under the criminal rules was a substantial and serious deficiency. Although we agree that the failure to take depositions requires an inquiry, it does not necessarily follow that this conduct in itself necessitates a finding of ineffective assistance of counsel or prejudice to appellant. This is particularly so when defense counsel, as was the case here, had sworn statements from each of the witnesses who testified and there is no showing as to what other information would have been provided to defense counsel through the use of depositions. In our view, the record clearly fails "to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Id. Appellant has made no attempt whatever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of his trial. Again, appellant has failed to show the required prejudice under Knight.

We previously rejected all the other alleged defects in the instant case when we remanded appellant's initial Rule 3.850 motion for an evidentiary hearing on the issue of the effectiveness of trial counsel.

For the reasons expressed, the trial court's denial of appellant's Rule 3.850 motion is affirmed.

It is so ordered.

ADKINS, Acting Chief Justice, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for St. Lucie County,

Dwight L. Geiger, Judge - Case No. 74-335 CF

Richard L. Jorandby, Public Defender and Jerry L. Schwarz, Assistant Public Defender, West Palm Beach, Florida,

for Appellant

Jim Smith, Attorney General and Gregory C. Smith, Assistant Attorney General, Tallahassee, Florida,

for Appellee

Supreme Court of Florida

TUESDAY, FEBRUARY 22, 1983

LEVIS LEON ALDRIDGE,	:	
Appellant,	:	CASE NO. 61,673
v.	:	Circuit Court No. 74-335 CF (St. Lucie)
STATE OF FLORIDA,	:	
Appellee.	:	

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED Appellant's Application for Stay of Mandate is granted and proceedings in this Court and in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida are hereby stayed to and including March 24, 1983, to allow appellant to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Janice Carole
Deputy Clerk

TC
cc: Hon. Roger Poitras, Clerk
Hon. Dwight L. Geiger, Judge

Craig S. Barnard, Esquire
Gregory C. Smith, Esquire

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JULY 7, 1981

LEVIS LEON ALDRIDGE,	**	
Appellant,	**	CASE NO. 60,610
vs.	**	Circuit Court Case No. 74-335-CF (St. Lucie)
STATE OF FLORIDA,	**	
Appellee.	**	

The Application for Stay of Execution filed June 29, 1981, is granted and appellant's execution is hereby stayed.

Upon review of the Record, the Application for Stay of Execution and the Response of the State, the order of the trial court is reversed and this cause is remanded for an evidentiary hearing with respect to the issue of effectiveness of trial counsel. Fla. R. App. P. 9.140(g).

SUNDBERG, C.J., OVERTON, ENGLAND and McDONALD, JJ., Concur
ADKINS and BOYD, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

cc: Hon. Roger Poitras, Clerk
Hon. Royce R. Lewis, Judge

Craig S. Barnard, Esquire
and Jerry L. Schwarz, Esquire
Miguel A. Olivella, Jr., Esquire

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS

SUPREME COURT

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
Aetna Casualty and Surety Co. v. Special Disability Trust Fund, State of Florida	60621	8/ 5/81	Pet. for rev. den.	1st DCA 397 So.2d 381
Agnitsch v. Cypress Community Hospital, Inc.	60600	8/ 5/81	Pet. for rev. den.	4th DCA 395 So.2d 1167
Albelo v. State	60815	6/30/81	App. dism.	3d DCA 400 So.2d 1342
Aldridge v. State	60810	7/ 7/81	Revd. & rem.	Cir. Ct. (St. Lucie)
Allen v. Arizona Properties Marketing Co., Inc.	60355	6/30/81	Pet. for rev. den.	1st DCA 392 So.2d 1359
American Hardware Mutual Insurance Co. v. Contreras	60472	7/10/81	Pet. for rev. den.	3d DCA 395 So.2d 179
Anderson v. Martincic	60527	6/23/81	Pet. for rev. dism.	5th DCA 386 So.2d 13
Armbrister v. Department of Health and Rehabilitative Services	60801	6/29/81	Pet. for rev. dism.	1st DCA
Austin v. Austin's Rack, Inc.	60653	8/ 5/81	Pet. for rev. den.	3d DCA 396 So.2d 1161
Bailey v. Johnson	60833	7/ 7/81	Dism.	4th DCA
Bailey v. Johnson	60912	7/27/81	Pet. for rev. dism.	4th DCA
Bailey v. State	60410	7/22/81	Pet. for rev. den.	3d DCA 393 So.2d 24
Baker v. Baker	60485	7/21/81	Pet. for rev. den.	4th DCA 394 So.2d 465
Bay Memorial Center v. Stepien	60741	6/30/81	Pet. for rev. dism.	1st DCA 397 So.2d 333
Becerra v. State	60593	6/30/81	Cert. dism.	
Behar v. Southeast Bank Trust Co., N.A.	60775	6/19/81	Pet. for rev. dism.	3d DCA
Berlin v. Berlin	60535	7/27/81	Pet. for rev. den.	3d DCA 395 So.2d 1260
Bernard v. Florida East Coast Railway Co.	59973	5/20/81	Dism.	5th DCA

* Date of decision or date rehearing denied (if requested)
** Court or agency rendering decision appealed and citation (if reported)

Levis Leon ALDRIDGE, Petitioner,

v.

STATE of Florida, Respondent.

No. 46958.

Supreme Court of Florida.

June 9, 1977.

Rehearing Denied Dec. 5, 1977.

Defendant was convicted in the Circuit Court, St. Lucie County, Wallace Sample, J., of first-degree murder and sentenced to death. Defendant appealed, and the Supreme Court held that: (1) a photograph depicting the murder victim's body was properly admitted; (2) under the circumstances, no error resulted from the trial court's direction to the jury that it must find a unanimous verdict; (3) it was not reversible error for the trial court to read to the jury a set of standard form instructions on second-degree felony-murder which had the net effect of barring a conviction for second-degree felony-murder, and (4) the circumstances warranted the death penalty.

Conviction and sentence affirmed.

Boyd, J., dissented and filed opinion.

Hatchett, J., dissented.

1. Criminal Law ⇨438(7)

Where allegedly gruesome photograph of murder victim's body was relevant to the details of the events which led to crime in

that it showed the location of the victim's body in relation to the restaurant which had been robbed, photograph was properly admitted in evidence, in first-degree murder prosecution, despite fact that both sides had stipulated to the date and place of death.

2. Criminal Law ⇐822(4)

When considered in the context of the entire charge, instruction that jury was required to find a unanimous verdict did not place pressure on jurors to return a verdict to which they did not agree and did not require reversal of first-degree murder conviction.

3. Homicide ⇐308(1)

Standard form instructions on second-degree felony-murder which have net effect of barring conviction for second-degree felony-murder are proper where the perpetrator of the independent felony also committed the homicide.

4. Homicide ⇐340(4)

Where verdict, in first-degree murder prosecution, indicated that jury found that defendant had killed the victim while in the course of committing a robbery, a form of murder described in the relevant statute as "first degree," no reversible error resulted from fact that trial court read to the jury a set of standard form instructions on a second-degree felony-murder which had net effect of barring conviction for second-degree felony. West's F.S.A. § 782.04(1)(a).

5. Homicide ⇐354

Where defendant was already under a sentence of imprisonment when he committed the murder for which he was sentenced to death and where the capital felony was committed while defendant was engaged in the commission of a robbery and there were no mitigating circumstances, death penalty was warranted. West's F.S.A. § 782.04(1)(a).

6. Criminal Law ⇐1068½

Supreme Court has duty to review the record in every case where the death penalty is imposed. West's F.S.A. § 921.141(4).

Richard L. Jorandby, Public Defender, and Craig S. Barnard, Asst. Public Defender, for petitioner.

Robert L. Shevin, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., for respondent.

PER CURIAM.

This case is here on direct appeal from the first degree murder conviction of Leon Aldridge and the imposition of a sentence of death. The trial court's sentence was preceded by a death sentence recommendation of a jury. Our jurisdiction to review this case is based on Article V, § 3(b)(1), of the Florida Constitution, and Section 921.141(4), Florida Statutes (1975).

The facts giving rise to Aldridge's conviction are not relevant to the points on appeal except insofar as they bear on the imposition of the death sentence. Aldridge previously had been convicted of a felony. While on parole, and after serving approximately 10 years in prison, he had been employed and befriended by the murder victim. The evidence at trial showed that Aldridge had planned to rob the victim's restaurant, and that he had borrowed a shotgun and shells in advance. During the commission of the robbery, three shotgun blasts were fired at the victim as he left the rear of the restaurant to enter his car. At least one of the blasts struck him in the head.

[1] Aldridge argues for reversal of his conviction on three points, the first of which is the introduction of an allegedly "gruesome" photograph showing the victim's body near his automobile at the rear of his restaurant. The photograph was introduced despite the fact that both sides had stipulated to the date and place of death. We agree with the trial judge's ruling on admissibility. The test for admission in Florida is "relevance".[1] The photograph here was relevant to the details of the events leading up to the crime, in that

1. *Young v. State*, 234 So.2d 341 (Fla.1970).

it showed the location of the victim's body in relation to the restaurant which had been robbed. This one photograph was not so objectional and inflammatory that the trial jury's verdict of guilt should be set aside. See *Halliwell v. State*, 323 So.2d 557 (Fla. 1975); *Funchess v. State*, 341 So.2d 762 (Fla.1976).

[2] Aldridge raises two points on appeal relative to charges given to the jury. The first involves a direction to the jury that it must find a unanimous verdict. Aldridge contends this instruction deprived him of the right to a so-called "hung" jury. In oral argument, Aldridge's counsel conceded that this point alone could not stand independently as a basis for reversal. We agree. When this instruction is considered in the context of the whole charge, it is clear that no pressure was placed on the jurors to return a verdict to which they did not agree. This case is not analogous, as Aldridge contends, to *Jones v. State*, 92 So.2d 261 (Fla.1956).

[3, 4] Aldridge also attacks the trial judge's instruction on second degree felony murder. In this case, just as in *Adams v. State*, 341 So.2d 765 (Fla.1976), the trial judge read to the jury a set of standard form instructions which had the net effect of barring a conviction for second degree felony murder. As we stated in *Adams*, however, those instructions are proper where the perpetrator of the independent felony (robbery here) also committed the homicide. The verdict indicates the jury found that Aldridge had killed a man while in the course of committing a robbery, a form of murder described as "first degree" in Section 782.04(1)(a), Florida Statutes (1973). There was no reversible error.

[5, 6] Aldridge's final points on appeal relate to the imposition of a death penalty. He asserts the unconstitutionality of the death penalty statute, which has already been resolved against him in other cases,[2] and the alleged error of the trial judge in describing the crime as heinous and atrocious in his written findings of aggravating and mitigating circumstances. We deem it unnecessary to pass upon Aldridge's challenge to the "heinous" finding of the trial judge[3] inasmuch as there were no mitigating circumstances[4] and adequate aggravating circumstances to sustain the penalty. Aldridge was at the time of the murder already under a sentence of imprisonment, and the capital felony was committed while Aldridge was engaged in the commission of a robbery.

For these reasons, we must conclude, as did the jury and the trial court, that the aggravating circumstances preponderate and the death penalty was warranted. The conviction and sentence are affirmed.

OVERTON, C. J., and ADKINS, ENGLAND and SUNDBERG, JJ., concur.

BOYD, J., dissents with an opinion.

HATCHETT, J., dissents.

BOYD, Justice, dissenting.

For two reasons I must respectfully dissent.

First, the only testimony of substance tying appellant to the crime was given by a convicted felon who had purchased and possessed the murder weapon in violation of conditions of his own parole. The witness admitted at trial that he had committed perjury by lying under oath to police in connection with statements made about this

2. *Alford v. State*, 307 So.2d 433 (Fla.1975); *Dixon v. State*, 283 So.2d 1 (Fla.1973). See also, *Proffitt v. State*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

3. But see *Halliwell v. State*, 323 So.2d 557 (Fla. 1975), as to the meaning of "heinous" and "atrocious" in our death penalty statute.

4. In this case, the trial court found no mitigating circumstances and Aldridge does not contest that finding on appeal. Rather, Aldridge, through his counsel, admitted the lack of mitigating circumstances and specifically requested the trial judge to impose the death penalty rather than incarcerating him for the minimum 25 years under our life sentence statute. This request, of course, has no bearing on our decision. We have a duty to review the record in every case where the death penalty is imposed. § 921.141(4), Fla.Stat. (1975).

crime. He further admitted he feared being returned to prison for buying and lending the death weapon to appellant. He had compelling reasons to implicate appellant or anyone else in the crime, since his gun was proven to have been used in the killing.

It very well may be true that appellant is the murderer, but the evidence submitted at the trial fails to constitute proof of guilt beyond and to the exclusion of reasonable doubt.

Under the statute of this State prescribing the procedures for imposition of sentences for capital felonies, Section 921.-141, Florida Statutes, this Court is not permitted to approve a sentence of death until each case is weighed by the criteria stated in the statute. The facts shown in the record do not afford a lawful basis for conviction or infliction of capital punishment.

Second, even if the evidence had been sufficient to convict, I think a finding of first degree murder would have been improper. The trial court charged the jury that it could not find the defendant guilty of second degree murder if it found the murder to have occurred during the perpetration of a robbery. This charge was directly contrary to the statute on second degree murder then in existence, Section 782.04(2), Florida Statutes (1973).[1] See my dissent in *Adams v. State*, Fla., 341 So.2d 765 opinion filed December 16, 1976.

Normally, I would feel bound by the precedent of *Adams, supra*. However, human life is so precious that I cannot concur in an opinion which sends a condemned person to death after instruction to the jury in direct conflict with the statute.

1. (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353.

Note.—Former s. 919.23.

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NO. 82-6433

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LEVIS LEON ALDRIDGE,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

ISSUE I

WHETHER THE DEFENDANT BELOW, AFTER HAVING ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, DEMONSTRATED ANY PREJUDICE FROM THE REPRESENTATION AFFORDED TO HIM BY HIS APPOINTED COUNSEL.

ISSUE II

WHETHER PETITIONER'S ISSUE CONCERNING THE FLORIDA SUPREME COURT'S APPLICATION OF THE ELLEDGE RULE, CANNOT BE CONSIDERED BY THIS COURT FOR A FAILURE OF JURISDICTION.

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OPINION BELOW

The opinion of the Supreme Court of the State of Florida which is sought to be reviewed is reported as Levis Leon Aldridge v. State, 425 So.2d 1132 (Fla. 1982).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) and to the extent that a substantial federal question was properly raised by petitioner and disposed of by the Florida Supreme Court this Court has jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves § 921.141, Florida Statutes (1977).

STATEMENT OF THE CASE

Respondent accepts the petitioner's Statement of the Case insofar as it deals with the procedural setting of the cause, but must take exception to the lengthy recounting of testimony presented at the evidentiary hearing.

The state courts did not find the various "facts" recounted by petitioner. Petitioner has selectively chosen those portions of the evidence which state the facts in a light most favorable to his case.

The State of Florida would urge this Court to accept the Statement of Facts in the opinion of the Florida Supreme Court as those presently before this Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

ISSUE I

WHETHER THE DEFENDANT BELOW, AFTER HAVING ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, DEMONSTRATED ANY PREJUDICE FROM THE REPRESENTATION AFFORDED TO HIM BY HIS APPOINTED COUNSEL.

Petitioner comes before this Court with the request that a writ of certiorari issue to the Supreme Court of Florida. In his two-part petition, petitioner first alleges that the standard of prejudice applied by the Florida courts in the analysis of his ineffective assistance of counsel claim, deprived him of rights secured by the United States Constitution. Additionally, petitioner complains that the review by the Florida Supreme Court on direct appeal from his conviction and death sentence, was violative of his federally-protected constitutional rights.

Respondent agrees with the petitioner's case insofar as it is obvious from a reading of Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), that the prejudice standard therein is substantially different from that found in Knight v. State, 394 So.2d 997 (Fla. 1981). In Knight, the Florida Supreme Court set a four-step process by which a defendant's claim of ineffective assistance of counsel should be examined. The third step in this four-step process is as follows:

> Third, the defendant has the burden to show that this specific serious deficiency, when considered under the circumstances of the individual

> case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.

394 So.2d, at 1001.

Washington, supra, held that a petitioner alleging ineffectiveness of trial counsel must show that the acts or omissions of counsel created not only "a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage." (Emphasis supplied.) 693 F.2d 1258.

Having acknowledged the conflicting standards, however, it is Florida's position that under either approach the necessary demonstration of prejudice in the instant case is lacking. If this Court should address the conflict inherent in the decisions of Washington and Knight, such an analysis would necessarily be dicta in this case.

Quite to the contrary of the representations made in the petition for writ of certiorari, the state courts did not find that the petitioner's lawyer was totally unprepared for the trial of petitioner's case. The Florida Supreme Court stated that the four issues raised in petitioner's post-conviction motion were as follows:

> 1) Whether he was denied the right to counsel during pretrial preparations by the assignment of a non-lawyer to represent him.

2) Whether the trial court denied him effective assistance of counsel by refusing to appoint an attorney from outside the public defender's office.

3) Whether the denial of the motion for continuance made immediately before trial was prejudicial error which appellate counsel should have raised on appeal.

4) Whether specific acts and omissions, particularly the failure to take depositions, denied appellant the effective assistance of counsel.

See Aldridge v. State, 425 So.2d 1132, 1135 (Fla. 1982).

The Florida Supreme Court, in finding that the petition for post-conviction relief was properly denied, found:

1) That the part-time legal intern assigned to petitioner's case was merely assisting trial counsel, Elton Schwarz, and was not in charge of the preparation of a defense.

2) That petitioner was not denied effective assistance by the failure to appoint an attorney outside the public defender's office, and that petitioner acquiesced in the representation by the public defender Elton Schwarz.

3) Petitioner was not denied effective assistance by the failure of appellate counsel to raise the denial of the continuance at the trial level, since no specific evidence was demonstrated by petitioner which would show that counsel could have gathered more evidence or prepared more fully had the additional time been granted.

4) Under the last point of alleged ineffectiveness, the Florida Supreme Court stated:

> Although we agree that the failure to take depositions requires an inquiry, it does not necessarily follow that this conduct in itself necessitates a finding of

> ineffective assistance of counsel or prejudice to appellant. This is particularly so when defense counsel, as was the case here, had sworn statements from each of the witnesses who testified and there is no showing as to what other information would have been provided to defense counsel through the use of depositions.

Aldridge, at 1136.

The findings made by the state court are entitled to great deference. Sumner v. Mata, 449 U.S. 539 (1981); Marshall v. Lonberger, ____U.S._____, 51 U.S.L.W. 4113 (1983). Thus, when the Florida courts found that petitioner had produced no evidence which would show that he would have been better prepared by the taking of depositions below, it becomes clear that there is no prejudice shown under any standard.

Under the Washington v. Strickland standard, petitioner would have to show that counsel's failure worked to his actual disadvantage. The petitioner was afforded the opportunity to produce evidence at the state level to demonstrate that the failure to take depositions caused him some injury. He was unable to present any evidence of harm to his case.

Petitioner has cited this Court's recent acceptance of certiorari in United States v. Cronic, ____U.S._____, 51 U.S.L.W. 3598, and stated that the instant cause would provide "a helpful companion case." A reading of the Tenth Circuit's decision in Cronic, 675 F.2d 1126 (10th Cir. 1982), reveals that Cronic adopted the rule of per se prejudice in the examination of ineffectiveness

claims. This Court rejected such an approach in United States v. Morrison, 449 U.S. 361 (1981). Cronic, therefore, cannot be equated with the case now before this Court.

Petitioner cites United States v. Morrison, supra, and generally states that this Court has required some demonstration of prejudice from petitioner in order to prevail. Petitioner has overlooked many cases from this Court which have touched this issue. In Darcy v. Handy, 351 U.S. 454 (1956), this Court required a showing of prejudice as a "demonstrable reality." More recently in United States v. Frady, 456 U.S. 152 (1982), this Court stated:

> Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, inflicting his entire trial with error of constitutional dimension. [Emphasis supplied.]

456 U.S., at 170. The mere possibility that information might have helped the defense or might have affected the trial, does not establish the requisite prejudice. United States v. Agurs, 427 U.S. 97 (1976). See also Smith v. Phillips, 455 U.S. 209 (1982).

It is clear that this Court has long required a demonstration of prejudice far in excess of that offered by petitioner below. Regardless of which of the prejudice standards is applied, the fact is that petitioner has failed to present any evidence which would show that the alleged failures of counsel resulted

in any substantial harm to his trial. This Court should refrain from granting petitioner's prayer for relief.

ISSUE II

WHETHER PETITIONER'S ISSUE CONCERNING THE FLORIDA SUPREME COURT'S APPLICATION OF THE ELLEDGE RULE, CANNOT BE CONSIDERED BY THIS COURT FOR A FAILURE OF JURISDICTION.

Petitioner brings to this Court an issue never reviewed by the Florida Supreme Court below. Specifically, the issue concerning the Florida Supreme Court's affirmation of the death penalty found in 351 So.2d 942 (Fla. 1977). While the issue can be found in the motion for post-conviction relief, it was never considered because under Florida law it could not be.

Respondent submits, therefore, that this issue cannot be considered because of a lack of jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969); Webb v. Webb, 451 U.S. 493 (1981).

In Webb v. Webb, supra, this Court dismissed for want of jurisdiction a petition for certiorari where the record failed to disclose that the federal question was presented to the Georgia Supreme Court and disposed of by that court. This Court said:

> . . . it is a long settled rule that the jurisdiction of this court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. . . .

Id. at 496. See also: Cardinale v. Louisiana, supra, at 438 (writ dismissed for want of jurisdiction after briefing and oral argument where record showed issue not presented in a state court).

In support of respondent's position that Florida law would not allow the issue to be considered on a motion for post-conviction relief, respondent cites Foster v. State, 400 So.2d 1 (Fla. 1981). In Foster, the Florida Supreme Court defined the parameters of a motion for post-conviction relief under Fla.R.Cr.P. 3.850:

> . . . the motion to vacate under Fla.R.Cr.P. 3.850 must be directed to the judgment and sentence of the trial court. Under no interpretation of this rule can any action of the Florida Supreme Court be reviewed.

Id. at 4. Thus, the allegation in post-conviction relief was improperly raised and the Florida Supreme Court, in affirming the trial court's denial of relief, could not have ruled on the issue. The rule of Cardinale v. Louisiana, supra, and Webb v. Webb, supra, requires this Court to find a lack of jurisdiction.

CONCLUSION

Petitioner has totally failed to demonstrate that under any standard of prejudice, petitioner was entitled to relief on his claim of ineffective assistance of counsel. Additionally, petitioner has failed to demonstrate that this Court has jurisdiction to entertain the allegation that the Florida Supreme Court improperly upheld the death sentence imposed upon him.

JIM SMITH
Attorney General

By: Gregory C. Smith
GREGORY C. SMITH
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 1983, a copy of this Brief in Opposition was mailed, postage prepaid, to Mr. Richard H. Burr, III, Assistant Public Defender, 224 Datura Street/13th Floor, West Palm Beach, Florida 33401. I further certify that all parties required to be served have been served.

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